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# Supreme Court of the United States

October 19, 1943 Term

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No. \_\_\_\_\_

MITCHELL IRRIGATION DISTRICT,  
a Corporation,

*Petitioner,*

vs.

JOHN A. WHITING, JR., Water Commissioner,  
District 14, Division 1, State of Wyoming,

*Respondent.*

## Petition For Writ of Certiorari to the Supreme Court of the State of Wyoming and Brief in Support Thereof

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# Supreme Court of the United States

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No. ....

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MITCHELL IRRIGATION DISTRICT,  
a Corporation,

*Petitioner,*

vs.

JOHN A. WHITING, JR., Water Commissioner,  
District 14, Division 1, State of Wyoming,

*Respondent.*

---

## MOTION FOR ISSUANCE OF WRIT OF CERTIORARI

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Comes now Mitchell Irrigation District, a corporation, by its counsel, James A. Greenwood, and moves this Honorable Court that by certiorari, or other proper process, directed to the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Wyoming, it require the Wyoming Supreme Court to certify to the United States Supreme Court for its review, that certain cause lately pending in said Supreme Court of the State of Wyoming, there numbered 2257 upon the docket of said Court, in which your petitioner, Mitchell Irrigation District, was appellant, and John A. Whiting, Jr., Water Commissioner of District No. 14, Division No. 1, Wyoming, was respondent; and to that end your petitioner now tenders herewith its petition, containing a brief statement of the facts and objects of the petition, and its brief in support thereof with a certified copy of the record in said cause from the Supreme Court of the State of Wyoming.

Dated this.....day of....., A. D., 1944.

JAMES A. GREENWOOD,  
Counsel for Petitioner.

# Supreme Court of the United States

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MITCHELL IRRIGATION DISTRICT,  
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vs.

JOHN A. WHITING, JR., Water Commissioner,  
District 14, Division 1, State of Wyoming,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI

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*To the Honorable Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioner, Mitchell Irrigation District, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Wyoming, being the highest Court of said State, in which a decision in said cause could be had in the above entitled action.

The opinion of the Wyoming Supreme Court was rendered and filed on the 27th day of April, 1943, (See 136 P. (2d) 502) (Rec. 175), and petition for rehearing being duly filed on the 24th day of May, 1943, in the Supreme Court of the State of Wyoming and denied without a hearing under order dated the 12th day of October, 1943, (Rec. 197). The decree of the Wyoming trial court appears Rec. 42.

A

### QUESTIONS INVOLVED

1. Whether or not the Wyoming Supreme Court can by judicial decree nullify Article 8, Section 3 of the Constitution of Wyoming, Appendix B, Page 25, by per-

mitting the diversion of water from the North Platte River in Wyoming for beneficial use under Wyoming adjudicated appropriations of water from the North Platte River, an interstate stream, in disregard of the priority right of petitioner guaranteed to it under the Wyoming Constitution and the Constitution of the United States.

2. Whether or not the Wyoming Supreme Court can by judicial decree sanction intentional discrimination against petitioner by refusing to protect the priority of petitioner's water right, acquired under Wyoming Territorial Law and sanctioned by the Act of July 26, 1866, and Desert Land Act of March 3, 1877, authorizing it to divert for beneficial use water in priority order and use the diverted water for irrigation of lands located in Nebraska for which the appropriation was obtained and adjudicated, solely because the water appropriated by petitioner is used to irrigate land located in Nebraska.

3. Whether or not the Wyoming Courts can arbitrarily refuse to enforce the law of priority when such refusal results in an intentional, unjust, and wrongful discrimination against the property right of petitioner, a citizen of Nebraska, and destroys a valuable property right protected under the Constitution of the United States and the Constitution of the State of Wyoming.

## B

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The constitutional provisions and statutes relied on appear in the Appendix, page 24-6.

## C

### **SUMMARY STATEMENT**

Petitioner is an irrigation district organized and existing under the laws of the State of Nebraska, of which state it is a citizen. It owns a water right acquired under Wyoming Territorial Law with priority of June 20, 1890, adjudicated by Wyoming State Board of Control, October 2, 1920, authorizing it to divert and take from the available natural flow of the North Platte River in Wyoming in priority order the quantity of water needed and within a maximum quan-

tity of 194.6 cubic feet per second of time, as fixed in said order of adjudication, and convey the same through its interstate canal, with head gate located approximately one-half mile above the Wyoming-Nebraska boundary line in Wyoming, into the State of Nebraska, where the same for more than fifty consecutive years, immediately prior to August 1, 1940, had been used for the irrigation of crops grown upon the lands comprising the Mitchell Irrigation District, during which period petitioner's water right, including the date of priority, acquired by compliance with Wyoming Territorial Law had been recognized and protected by the State of Wyoming.

Petitioner brought this suit in the District Court of Goshen County, State of Wyoming, to obtain a mandatory injunction requiring the respondent, an administration official of the State of Wyoming, to regulate the diversion and taking of appropriated waters from the available natural flow of the North Platte River, an interstate stream flowing within District 14, Division 1, in Wyoming, in strict priority order of adjudicated appropriations diverting in that area when the available supply was insufficient to meet all demands.

The respondent, a state official acting as the administrative agent of the State of Wyoming, has exclusive jurisdiction over all diversions of appropriated water from the North Platte River in Division 1, District 14, State of Wyoming, within which district and division petitioner diverts. Section 122-303, 304, W. R. S., 1931, Appendix C, pages 25-6, requires that such official divide, regulate, and control the diversion and taking of appropriated water in times of scarcity by all appropriators under the Commissioner's jurisdiction in strict priority order.

Upon the trial of this cause in the District Court, the respondent stated (Rec. 116-17) that he would not enforce the law of priority so far as petitioner's right to divert water from the North Platte River was concerned unless compelled to do so by a court order; the Wyoming Courts refused to issue such order. The action of the respondent was not an error in judgment, nor the result of discretion reasonably exercised, but represented deliberate purposeful action preceded by a conference with the state engineer of the State of Wyoming and the superintendent of Water Division No. 1, (Rec. 83). These two state officials have supervisory authority over the action of all water com-

missioners in Division 1, District 14, in the exercise of their exclusive duty of protecting all adjudicated water rights without discrimination and permitting diversion only in strict order of priority at all times of insufficient water supply; and the state engineer and the superintendent of Water Division No. 1, concurring in the conduct of the respondent, results in a denial to the petitioner of protection to which it is entitled under the Constitution of Wyoming, Article 8, Section 3, see Appendix B, page 25; under the Statutes of Wyoming; and under the Constitution of the United States. These officials have indicated by their acts and conduct that the settled policy of future administration will be to refuse regulation on priority basis for the benefit of petitioner because its irrigated lands are located in the State of Nebraska and because the water diverted by petitioner is not used on Wyoming lands. The respondent purporting to act under state authority has invaded petitioner's right secured by the Federal Constitution.

D

**THE QUESTION INVOLVED IS SUBSTANTIAL**

The priority of petitioner's water right is the most valuable element of such right. At times when the water from the common source of supply is insufficient to meet the needs of all appropriators dependent thereon, it is only by reason of petitioner's early priority, as there is no unappropriated water in the stream, that petitioner can obtain water for irrigation of its District lands. The petitioner's whole irrigation district is threatened with destruction if appropriators with junior priority dates, having diversion points above petitioner's head gate in Wyoming, are permitted by Wyoming officials and Wyoming Courts to disregard the senior priority of petitioner's adjudicated water right and take water that would otherwise be available for diversion and beneficial use by petitioner in priority order to the extent of its need and within its maximum adjudication.

Intentional disregard of Wyoming constitutional provisions and Wyoming statutes means that the 14,000 acres of highly developed crop lands which produce maximum yields of beets, small grain, corn, and grasses can no longer be profitably farmed. The productive value per acre will

shrink from \$175.00 per acre per year to the status of dry land farms with a productive value of \$25.00 per acre per year. There is no other source of water supply; and farm lands of the aggregate value of more than two million dollars, with an annual production value of more than a million dollars, will be destroyed if the Wyoming Supreme Court be not required by appropriate mandate to protect petitioner's water right priority against Wyoming junior appropriators permitted by Wyoming officials to disregard petitioner's priority. See *Home Ins. Co., et al. v. C. J. Dick, et al.*, 281 U. S. 397, 74 L. Ed. 926. The Wyoming Court has denied protection to petitioner and has renounced its power to protect petitioner's property right secured by the Constitution of the United States and the Constitution of Wyoming. The decree of the Wyoming Courts disregards petitioner's substantial property right acquired under Federal Law, prior to Wyoming Statehood.

## E

### **JURISDICTIONAL STATEMENT**

Basis of jurisdiction relied upon by petitioner:

Petitioner bases its request for the issuance of a writ of certiorari directed to the Supreme Court of the State of Wyoming upon the fact that a final decree has been rendered by the highest Court in Wyoming, in which a decision could be had, wherein petitioner claimed a title, right, and privilege under the Constitution of the United States, which has been denied by the decree of the Wyoming Supreme Court. The attention of the Wyoming Courts was challenged to petitioner's constitutional claim from the beginning.

Petitioner first brought to the attention of the Wyoming trial court its claim under both the Wyoming and United States Constitution in its pleadings, (Rec. 8).

Petitioner brought to the attention of the Wyoming Supreme Court its claims under the State and Federal Constitutions in its assignments of error on appeal (R. 43).

Petitioner's claim under the due process clause of the Federal Constitution was raised by assignment of error to Wyoming Supreme Court, (Rec. 8), the 14th Amendment to the Constitution of the United States was again specifically brought to the attention of the Wyoming Supreme Court by assignment of error in its petition for rehearing, (Rec.

page 197, paragraph 7), pursuant to Rule 23 of the Wyoming Supreme Court, which provides:

**"APPLICATION FOR REHEARING:**

Application for rehearing of any cause shall be by petition to the court, signed by counsel, briefly stating the points wherein it is alleged that the court has erred. Such petition shall be filed within thirty days after the decision is rendered and shall be accompanied by a brief (five copies of which shall be filed) of the points and authorities relied on in support thereof; but there shall be no oral argument, on petitions for rehearing, unless such argument is requested by the court."

in which petition was specifically assigned the following error committed by the Wyoming Supreme Court in its decree, Paragraph 7, (R. 197):

"In that said judgment and decree results in the State of Wyoming in depriving appellant of a vested property right without due process of law and in denying appellant the equal protection of the law within the jurisdiction of the Wyoming court as provided by the 14th Amendment to the Constitution of the United States."

And in error No. 8, as assigned in said petition for rehearing:

"In refusing to protect the appellant in the full, proper and legal use and enjoyment of a vested substantial property acquired under sanction of national law, entitled to be protected and made secure and available to the appellant under the Constitution of the United States, under the Constitution of the State of Wyoming, under the statutes of Wyoming, and under the decision of the Supreme Court of Wyoming in construing these statutes."

Petitioner's title right and privilege claimed under the Constitution of the United States, on the authority of the *Great Northern Railway Company v. Sunburst Oil and Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, and *Brinkerhoff-Faris Trust and Savings Company v. Walter O. Hill*, 281 U. S. 673, 74 L. Ed. 1107, was timely.

The attention of the Wyoming Courts was promptly challenged, that petitioner was claiming a right under Federal Law, in the allegations (Rec. 1) of its petition that its water right was a Territorial Water Right acquired by compliance with Federal Law. See *Howell v. Johnson, et al.*, 89 Fed. 556.

Under Rule 24, W. S. C., a decision of that Court is not final until petition for rehearing is disposed of.

**"APPLICATION SUSPENDS PROCEEDINGS.**

The filing of petition for re-hearing within the time aforesaid shall suspend proceedings under the decision until the petition is disposed of unless the court, or one of the justices in vacation, shall otherwise order."

Petitioner's claim of right and privilege under Article 4, Section 1 of the Constitution of the United States was presented to the Wyoming Supreme Court (Rec. 43) by assignment of error and was specifically urged before the Wyoming Supreme Court (Rec. 43) where petitioner assigned the following error for consideration by the Wyoming Supreme Court:

"d. In that said judgment is in violation of Article 4, Section 1, of the Constitution of the United States extending full faith and credit to the public act, record, and judicial proceedings of the State of Nebraska in adjudicating through its Department of Roads and Irrigation, Water Power and Drainage on November 27, 1940, the plaintiffs and appellant's appropriation of water from the natural flow of the North Platte River."

The Wyoming courts ruled on petitioner's claim, and the decision was against petitioner's Federal guarantees.

Authorities submitted in support of application for the issuance of writ of certiorari:

Judicial Code Section 237 Amended, Title 28, Section 344, Paragraph B, U. S. C. A.

*Rosalyn Zucht v. W. A. King, et al.*, 260 U. S. Rept. P. 174, 67 L. Ed. 194.

*Corporation Commission of State of Oklahoma, et al. v. William Lowe*, 281 U. S. Rept. 431, 74 L. Ed. 945.

*Edgar Smith v. State of Texas*, 311 U. S. Rept. 128, 85 L. Ed. 84.



Alice Lee Grosjean v. American Express Company, 279 U. S. Rept. 233, 80 L. Ed. 660.

Thomas M. Lynch, et al., as Tax Commissioners of the State of New York v. People of the State of New York upon the Relation of Elizabeth Pierson, 293 U. S. 52, 79 L. Ed. 191.

Thomas P. Crowell v. John Randell, Richard Shoemaker v. John Randell, 35 U. S. 368, 9 L. Ed. 458.

Live Oak Water Users' Association, et al. v. Railroad Commission of the State of California, et al., 269 U. S. 354, 70 L. Ed. 305.

R. S. Sterling, et al. v. E. Constantin, et al., 287 U. S. 378-404, 77 L. Ed. 375.

The decision of the Wyoming Court does not rest upon local law, but exclusively on a Federal question. The opinion of the Wyoming Supreme Court, reported 136 P. (2d) 502, (Rec. 175), may leave the reader with the impression that the issue submitted was properly disposed of on non-federal ground, but an examination of the record will remove that impression.

## F

### **REASONS RELIED ON FOR THE ALLOWANCE OF WRIT OF CERTIORARI**

1. The decree of the Wyoming Supreme Court results in unjust, intentional, arbitrary, and unlawful discrimination between petitioner and others, who are all situated in identical circumstances, except petitioner is a citizen of Nebraska, while all junior appropriators are Wyoming citizens, in violation of Article 4, Section 2, Constitution of the United States and denies petitioner equal protection of law for its property within the jurisdiction of the State of Wyoming, and deprives petitioner of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

2. The decree of the Wyoming Supreme Court violates the right, title, and privilege of petitioner, protected under the 14th Amendment to the Constitution of the United States, to have appropriated water of the North Platte River in Wyoming diverted only in strict priority order when the supply is not sufficient to satisfy all legal demands therefor.

3. The decree of the Wyoming Supreme Court results in discrimination against petitioner, forbidden by the 14th Amendment to the Constitution of the United States, in that it results in the unlawful injury and destruction and taking of petitioner's vested substantial property right without due process of law.

There is wanting any non-federal grounds upon which to rest the decision of the Wyoming Supreme Court. The only issue presented to the Wyoming Courts for decision and the only issue decided was whether or not, as a matter of law, the respondent could be required to comply with Wyoming Law and regulate head gates of all ditches and canals diverting water from the channel of the North Platte River in District 14, Division 1, in Wyoming under Wyoming adjudicated water rights and permit diversions only in strict order of priority at times when the available supply is insufficient to satisfy all lawful demands therefor, regardless of whether the diverted water is to be beneficially used in Wyoming or in Nebraska, or can the constitutional right of petitioner, a citizen of Nebraska, be disregarded solely because the water diverted by petitioner is conveyed in its canal into the State of Nebraska and there used to irrigate Nebraska lands? The decision was against petitioner's constitutional title, right, and privilege, resulting in the total destruction of petitioner's valuable vested property right, as its water right, without protection of its priority, is valueless.

Your petitioner appends hereto its brief in support of its petition.

G

**PRAYER**

WHEREFORE, your petitioner, the Mitchell Irrigation District, respectfully prays that a writ of certiorari issue to review the decree of the Supreme Court of the State of Wyoming in the above entitled case.

Respectfully submitted,

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JAMES A. GREENWOOD,  
302 Hynds Bldg., Cheyenne, Wyoming,  
*Attorney for Petitioner.*





# Supreme Court of the United States

October 19, 1943 Term

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No. ....

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MITCHELL IRRIGATION DISTRICT,  
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District 14, Division 1, State of Wyoming,

*Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I

#### SUMMARY OF ARGUMENT

Petitioner owns an adjudicated water right from the North Platte River, an interstate stream, acquired prior to Wyoming Statehood, with point of diversion in Wyoming, used exclusively for irrigation of land in Nebraska.

The law of priority obtains in both Wyoming and Nebraska and water is diverted in both states under adjudicated appropriations obtained by compliance with laws of the respective states or, prior to statehood, by compliance with territorial law, for beneficial use.

The diversion and taking of water for beneficial use in each state is controlled exclusively by state administration officials who are required to perform their duties in compliance with law.

From date petitioner acquired its appropriation, its right to divert and take for beneficial use in the irrigation of its Nebraska lands the amount of water appropriated under its priority date was, prior to August 1, 1940, always recognized; and petitioner used water diverted under its

appropriation continuously from June 20, 1890 to August 1, 1940, without interference from junior appropriators in Wyoming.

Since August 1, 1940, Wyoming officials have intentionally refused to enforce the law of priority to protect petitioner from unlawful diversion by appropriators in Wyoming whose appropriations are junior in priority to petitioner's priority.

Petitioner seeks the aid of this Court against the wrongful, unlawful, intentional, and arbitrary acts of the Wyoming officials which acts have resulted in substantial injury to the petitioner and if permitted to continue will destroy a substantial property of petitioner protected under the Federal Constitution.

## II

### **AUTHORITIES AND ARGUMENT**

#### **A Water Right Constitutes a Property Right**

A water right, acquired under Wyoming law, has been held by decisions of the Supreme Court of Wyoming to constitute private property, and that the priority of a water right is the most valuable element of such property has been likewise judicially recognized. The record in this case, free from any contradiction, shows conclusively that not only has petitioner a water right, constituting a valuable property right with a priority senior in time to those whom the respondent has continually permitted to divert water in disregard of petitioner's right, but that petitioner's water right was acquired before Wyoming became a state, on July 10, 1890, and shows that all appropriators junior to petitioner, diverting from the North Platte River in Wyoming, above petitioner's point of diversion, acquired their rights with knowledge of, and subject to the prior right of petitioner to at all times, when needed and available, use the water of the North Platte River to the extent of its appropriation, before any one of them could legally divert a single cubic foot of water from the common source of supply, but the judgment, entered in the case at bar, ignores entirely petitioner's priority right.

See: Art. 8, Sec. 3, Constitution of Wyoming, Appendix B, page 25.

Hereford Ranch v. Packing Co., 33 Wyo. 14, 236 P. 764.

Hunt v. City of Laramie, 26 Wyo. 160, 181 P. 137.

Whalon v. Canal Co., 11 Wyo. 313, 71 P. 995.

Kinney on Irrigation & Water Rights, 2d Ed., Vol. 2, Sec. 768.

Long on Irrigation, 2d Ed., Ch. 7, pp. 293-94.

Wiel on Water Rights in Western States, Vol. 1, 3d Ed., Sec. 308, page 326.

Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92, 82 L. Ed. 1202.

### **Official Status of a Wyoming Water Commissioner**

Wyoming water commissioners have been many times held by the Wyoming Supreme Court to be executive officers charged with performing only ministerial duties, and exercising only police power, with no authority to question the existence or status of any water right, whether it be an adjudicated right or merely a permit, their duty being to regulate and control within the area to which they are assigned, the diversion and taking for beneficial use of appropriated water, strictly in conformity to priority of right.

See: Sec. 122-303, 304, W. R. S. 1931, Appendix C, pp. 25-6.

Laramie Irrigation & Power Co. v. Grant, Water Commissioner, 44 Wyo. 392, 13 P. (2d) 235.

Ryan v. Tutty, 13 Wyo. 122, 78 P. 661.

Hamp v. State, 19 Wyo. 377, 118 P. 653.

Parshall, State Engr. v. Cowper, 22 Wyo. 385, 143 P. 302.

Van Buskirk v. Live Stock Co., 24 Wyo. 183, 156 P. 1122.

Farm Investment Co. v. Carpenter, et al., 9 Wyo. 110, 61 P. 258.

And the Wyoming Court so found in Conclusions of Law No. 1, (R. 49), and Conclusions of Law No. 7, (R. 40).

**Respondent water commissioner's disregard of the law of priority in dividing, regulating, and controlling the diversion and taking of appropriated water in accordance with decree priorities when the supply was insufficient to meet all needs was unlawful.**

The following authorities illustrate how uniformly the law of priority has been enforced and generally recognized under varying conditions, and showing how utterly erroneous is the judgment entered in the case at bar.

See: Clark, et al. v. Ashley, et al., 82 P. 588.

Lower Latham Ditch Co. v. London Irrigation Canal Co., et al., 60 P. 629.

Alamosa Creek Canal Co., et al. v. Nelson, et al., 93 P. 1112.

Rodgers v. Nevada Canal Co., 151 P. 923.

Platte Valley Irr. Co. v. Buckers Irr. Co., et al., 53 P. 334.

Hufner, et al. v. Sawday, et al., 94 P. 424.

Comstock, et al. v. Ft. Morgan Res. & Irr. Co., 151 P. 929.

Union Mill & Mining Co. v. Dangberg, et al., 81 Fed. 73.

### **Priority of Water Right on Non-Navigable Interstate Stream**

In the supervision and control of the diversion and taking of appropriated water for beneficial use from a non-navigable interstate stream, the priority rights of individual appropriators having acquired appropriations under the laws of different states, receive the same recognition as if all appropriations from such stream were made by compliance with laws of a single state. State lines do not affect such rights in states where the law of priority obtains.

Water rights on interstate streams have been by all courts protected by the enforcement of the priority doctrine, the same as rights local to the jurisdiction of a single state; see Wiel, Vol. 1, Page 364, Sec. 343; Kinney on Irrigation & Water Rights, 2d Ed., Vol. 3, Page 2975, including the decisions of the Supreme Court of Wyoming, Sec. 1629, where the decisions on the question are reviewed.

The only interstate feature of petitioner's water right is the fact that the water diverted under its adjudicated Wyoming territorial appropriation is diverted in Wyoming, and conveyed in an interstate canal into the State of Nebraska,



where the diverted water is applied to beneficial use in the irrigation of Nebraska lands.

The following authorities sustain petitioner's right to be protected in times of insufficient water supply to satisfy all needs:

Wiley, et al. v. Decker, et al., 11 Wyo. 496, 73 P. 210.

Morris v. Bean, 123 Fed. 618, affirmed 221 U. S. 485, 55 L. Ed. 821.

Taylor v. Hulett, et al., 97 P. 37.

Conant, et al. v. Deep Creek & Curlew Valley Irr. Co., 66 P. 188.

Weiland v. Pioneer Irrigation Co., 238 Fed. 519, affirmed 259 U. S. 498, 66 L. Ed. 1027.

Miller & Lux v. Rickey, et al., 123 Fed. 604, affirmed 218 U. S. 258, 54 L. Ed. 1032.

Howell v. Johnson, et al., 89 Fed. 556.

Anderson, et al. v. Bassman, et al., 140 Fed. 14.

Hoge v. Eaton, 135 Fed. 411.

#### **Adjudicated Water Rights Subject to State Supervision**

The petitioner's water right was acquired by compliance with Wyoming Territorial Law and adjudicated by Wyoming State Board of Control, under order dated the 2nd day of October, 1920. Pursuant to the order of the Nebraska Supreme Court in the case of Sorensen, Attorney General v. Mitchell Irrigation District, petitioner had its water right adjudicated by the Nebraska State Board of Roads and Irrigation under order dated the 27th day of November, 1940, an official body clothed with authority to adjudicate water rights. All water rights, both in Wyoming and Nebraska, on the North Platte River that have any connection with the issues had been duly adjudicated, prior to the commencement of petitioner's suit, both the rights referred to in petitioner's petition and the additional rights referred to in the decision of the Supreme Court of Wyoming.

The adjudication of a water right, under either Wyoming law or Nebraska law, means that a board, court, or tribunal duly authorized, shall consider the application of an appropriator and hear the evidence offered in support thereof, and if the same is found to be sufficient enter its order or decree fixing the date of priority of the appropriation, designating the stream from which the supply is to

be taken, the point at which the diversion is to occur, the volume which the appropriator is entitled to divert, and the beneficial use to be made thereof.

As to all water rights on the North Platte River, both in Nebraska and Wyoming, that have any material connection with this action, such an order of adjudication had been duly entered before petitioner's suit was instituted, so that notwithstanding the statement in the decision of the Wyoming Supreme Court that rights of junior appropriators in Wyoming must be considered and that such appropriators should have their day in court before the relief prayed for by petitioner could be granted, there was no issue to be adjudicated or litigated between the petitioner and any other appropriator on the North Platte River. The official orders of adjudication of all these Wyoming junior appropriations were all officially recorded, none of them were questioned in any manner by petitioner, to the contrary their status as determined by the order of adjudication was throughout the litigation unqualifiedly admitted. This being so, with the further fact that the administration of the appropriated waters of the North Platte River in Wyoming by statute has been reserved to the State and by statute exclusively placed with a water commissioner, a state administrative official of the district in which the diversion is made, and that in times of insufficient water supply no appropriator can interfere with the commissioner's regulation of diversions in the area in which he has jurisdiction, there was no need to bring in other parties in order to litigate the single issue between the petitioner and the Wyoming official as to whether or not the law of priority would be enforced, or whether junior appropriators in Wyoming, in direct violation of Article 8, Section 3 of the Constitution of Wyoming, and Sections 122-303 and 304 of W. R. S., 1931, should be permitted to divert from the available quantity when insufficient to fill all legal demands made thereon in disregard of the petitioner's senior priority. There was no other issue presented or raised by the pleadings, and there was no other issue for the Wyoming Courts to decide.

The result of the decision of the Wyoming Supreme Court makes it very definite and certain that petitioner's water right will be totally destroyed. This result inescapably follows such decision since the North Platte River is an over-appropriated stream. There is not at this time, and there never will be in the future, an opportunity to obtain

water by appropriation, and should protection of petitioner's priority be now denied in this Court, the destruction of its water right follows because it can obtain no relief from any other source. The Wyoming Supreme Court in its opinion forewarned petitioner not ever to make further effort before it to protect its water right priority as it would be subject to a plea of laches. See Opinion, 136 P. (2d), (Rec. 194) even though petitioner had enjoyed the unmolested full use of its water right, including priority, for more than half a century and commenced its action to protect same within less than six months after learning of the purpose of Wyoming state officials to refuse recognition thereof in the future.

The evidence in the case is free from any conflict and conclusively establishes that during the period from August 1, 1940, to the end of the irrigation season, September 30th, through the willful discriminatory conduct of the respondent water commissioner, water appropriators having points of diversion in Wyoming in the same jurisdictional area where petitioner diverts, but above its point of the diversion, were permitted to divert continuously, day after day, in the most critical period of the irrigation season, a very substantial quantity of water in excess of 100 cubic feet per second of time, all taken under appropriations junior in time and junior in right to petitioner's appropriation, and that the water so taken, or a substantial part thereof, would have been available, for use by the petitioner, had those unlawful diversions been prohibited. And the evidence likewise shows an intention by Wyoming in the future to disregard petitioner's vested property right and permit the destruction thereof for the benefit of appropriators who make use of the water diverted from North Platte River for irrigation of lands located in Wyoming. See Respondent's Statement, Rec. 86, 116-117.

Section 122-303, W. R. S., 1931, see Appendix C, page 25-6, first adopted as Section 42 of Chapter 8 of the Laws of Wyoming, approved December 22, 1890, had been continually since that date construed to the effect that no distinction should be recognized between appropriators of water in Wyoming for beneficial use in irrigation of lands within Wyoming and appropriators of water in Wyoming for beneficial use in irrigation of lands situated in another state, where the diversions were made from an interstate stream. Not until the decision pronounced in the case at

bar had Wyoming statutes and Constitutional provisions been otherwise construed or interpreted by a Wyoming Court with reference to the duties of a state water official until the decree rendered herein departed from that construction. In the opinion of the Supreme Court in the case at bar for the first time that statute has been erroneously and arbitrarily construed as applying to lands in the State of Wyoming only; and while not specifically so stating, the decision appealed from in the case at bar is in direct conflict with the law as pronounced in *Wyoming v. Colorado*, 259 U. S. 419, 66 L. Ed. 999, and *Weiland v. Pioneer Irrigation Co.*, 238 Fed. 519, affirmed 259 U. S. 498, 66 L. Ed. 1027, and the Wyoming cases of *Willey, et al. v. Decker, et al.*, reported in 11 Wyo. 496, 73 P. 210, decided August 3, 1903, and *Farm Investment Co. v. Carptener, et al.*, 9 Wyo. 110, 61 P. 258, which sustain every contention of petitioner herein.

### III

#### NECESSARY PARTIES

The Wyoming Court dismissed petitioner's suit on the sole ground that certain parties not before the Court were indispensable.

These parties are named in Conclusion of Law No. 11, (Rec. 41). They include Wyoming appropriators whose adjudicated water rights were found to be junior in priority to petitioner's, see Conclusion of Fact, No. 17, (Rec. 37); and Nebraska appropriators whose water rights were found to be senior in priority to that of petitioner, see Conclusion of Fact, No. 18, (R. 37).

The presence of necessary parties to enable the Court to proceed without prejudicing the rights of persons not parties to the suit was not raised by the pleadings, in the briefs or in oral argument before the trial court, being first mentioned in the trial court's conclusions of fact and conclusions of law. As a basis therefor the Court relied on Section 89-521 W. R. S., 1931, see appendix C, page 26.

In the Wyoming case of *Binning v. Miller, et al.*, 55 Wyo. 478, 102 P. (2d) 64, the Wyoming Supreme Court construed that statute as to the duty of a trial court where all interested parties were not before the Court, and remanded the case with directions that those parties whose interest were involved be called in or be given an oppor-

tunity to voluntarily come in and then if they did not appear the action should be dismissed. That is far different from the disposition made of the case at bar. There are no substantive conflicting property rights to be determined in this case as in the Binning case. The only issue being the protection of a vested property right from being invaded, interfered with, and destroyed by unlawful acts of the respondent. The Wyoming Court in dismissing petitioner's suit without prejudice, viewed in the light of the established facts, says, in effect, to the petitioner, you are in a predicament, even though you have an established vested property right and have shown that Wyoming officials are intentionally destroying that right and have stated their intention to continue such conduct. The Wyoming Courts will not protect your right.

The construction of the above statute was also before the Wyoming Supreme Court in an earlier case, *Kirch v. Nicholson*, 42 Wyo. 489, 297 P. 398; and the construction there pronounced was not followed in the case at bar. Nor did the Wyoming Court follow the principle stated by the U. S. Supreme Court in *Elmendorf v. Taylor, et al.*, 10 Wheat. (U. S.) 150, 6 L. Ed. 289.

There is in the case at bar a single issue, namely, to require the lawful performance of official administrative duties by a Wyoming official within the State of Wyoming for the protection of property rights in Wyoming but owned by a citizen of Nebraska.

Neither the junior Wyoming appropriators nor the Nebraska senior appropriators could possibly be indispensable or even necessary parties. Their several rights to divert water had all been judicially established and the decrees of adjudication were not in question. Bringing the Wyoming junior appropriators into the case certainly could not have changed the date of their priority nor the volume of water which they were entitled to divert, nor the beneficial use for which the appropriation was granted, nor the point of diversion. None of these were in question. Their decrees of adjudication were all final, binding upon not only petitioner but upon the Wyoming Courts. See *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 82 L. Ed. 1202. If any question could become a proper subject of judicial inquiry as to the relative rights of petitioner and any other appropriator on the North Platte River, the relief prayed for by petitioner, if granted, would not bar

such inquiry and respondent would not be either a necessary, proper, or indispensable party to such inquiry.

Aside from the fact that the Wyoming Courts could not acquire jurisdiction over the Nebraska senior appropriators, the decrees of the Nebraska appropriations were not questioned. A decree protecting petitioner's vested right from continued invasion by the respondent could under no circumstances disturb the rights of either junior or senior appropriators. A decree requiring respondent to perform his ministerial duties in a lawful manner should be beneficial to all appropriators and their presence as parties was not essential. The Court found in Conclusion of Law No. 2, (Rec. 39), it is the duty of respondent to divide, regulate, and control the diversion and taking of appropriated water from the North Platte River channel under adjudicated water rights within said Division No. 1, District No. 14, in strict priority order at all times when the quantity available is insufficient to meet all demands made upon the respondent under adjudicated appropriations diverting in that area.

The question may properly be asked, how could the extent or character of the duty to be performed by respondent be changed in any way if others be made parties to the suit?

The proceedings against the respondent were strictly in personam to protect petitioner's property right from the injurious result of unlawful acts and wrongful conduct of a Wyoming administrative official, only a police officer.

That the respondent was exclusively in control of the diversion and taking of appropriated water in the water division and district in question is not a subject for investigation. It was so alleged by petitioner, (Rec. 3), and admitted by respondent, (Rec. 11).

The Wyoming Supreme Court in the case of Irrigation Company v. La Porte, 26 Wyo. 522, 188 P. 360, considered a similar question and stated as follows:

"The petition in this case alleged that no one except Nina A. La Porte had any claim upon the security of the bond sued upon, and the judgment of the Natrona county district court adjudged costs to her alone. Under these circumstances it would have been useless to have brought the other named obligees on the bond into the case."

The bringing of other parties in as plaintiffs or defendants would be useless.

In the Wyoming case, *Laramie Irrigation & Power Co. v. Grant, Water Commissioner*, 44 Wyo. 392, 13 P. (2d) 235, the suit was commenced by the Power Company against Grant in his capacity as Water Commissioner, occupying a position identical with respondent herein. An injunction was granted to restrain him from alleged wrongful acts in regulating head gates on streams in the district under his authority. The order upon review, was vacated but not upon the ground that the trial court was without jurisdiction to grant the same because of defect of parties.

#### IV

#### WATER SUPPLY

Respondent contended that there was a quantity of water passing petitioner's head gate continuously during the months of August and September 1940, (Rec. 86), from which supply petitioner could have relieved its need by raising its head gate and taking the volume needed into its canal.

The evidence shows that the water passing petitioner's head gate during the months of August and September 1940 was appropriated water all ear-marked to satisfy demands of senior appropriators diverting below petitioner's head gate. (Rec. 99).

Respondent testified that there was sufficient water available but petitioner neglected to take it, (Rec. 85), but admitted that his statement was based upon a refusal by him to consider any demands below petitioner's head gate in the State of Nebraska, (Rec. 116), that he made his statement in disregard of all demands of senior appropriators in Nebraska, (Rec. 117). Respondent also testified that all his testimony with reference to quantity of water at petitioner's head gate was based upon the condition of the river in Wyoming at petitioner's head gate and in total disregard of the needs of senior appropriators below petitioner's head gate in Nebraska, stating that his position is based upon the fact that he does not recognize, in his administration, conditions below the state line, (Rec. 117), and that he would not close junior Wyoming diversions to enable any increased supply of water to reach petitioner's head gate as long as water in the amount of 194.6 feet per



second or more was in the river channel at petitioner's head gate, irrespective of whether that water was going down the river channel to satisfy senior demands in Nebraska or not.

R. I. Meeker and R. H. Willis each having an actual personal acquaintance with the North Platte River extending over more than thirty-five years, and each knowing intimately the principle upon which the doctrine of priority is applied, testified that after July 27, 1940, to the end of the irrigation season September 30th, there was no water available at petitioner's head gate to be taken by it in priority order, (Rec. 99), that the reason of the shortage was the taking of water by junior canals above petitioner's head gate in Wyoming, (Rec. 103-4), that petitioner would be either directly or indirectly benefited if the law of priority was enforced, (Rec. 108-109, Rec. 70-71).

The opinion of the Wyoming Supreme Court emphasizes the statement of respondent that to close down junior appropriations above petitioner's point of diversion in Wyoming would not result in an increased flow of more than ten per cent, (Rec. 87). Respondent made such statement; but he also admitted that the volume of water flowing in the channel of the river at petitioner's head gate if junior diversions above in Wyoming were closed would be increased in proportion to the quantity contributed by such closing, less normal transit loss, (Rec. 103).

Witness Meeker testified that the duty of transportation with a wet river channel in the area where petitioner and these juniors divert would not exceed five per cent, that the transportation loss would be negligible, (Rec. 94). The opinion made no mention of Meeker's statement which established normal loss and his statement is not contradicted.

By decree of the District Court of Scotts Bluff County, Nebraska, (Rec. 120), petitioner is enjoined from diverting into its canal any water, when such diversion would deprive a senior appropriator below of water needed and being demanded under an appropriation with priority senior to petitioner's priority. The Wyoming Court found that one of the reasons for the inability of petitioner to obtain water when needed was the direct result of the Nebraska Court Decree. Conclusion of Fact No. 16, (Rec. 37).



Petitioner submits the Nebraska Court Decree is not in the least a justification for the acts and conduct of respondent. The law of priority applies in Nebraska. See Conclusion of Fact No. 19 and State ex rel. Carey v. Cochran, 292 N. W. 239; Enterprise Irrigation District v. Willis, 284 N. W. 326; Farmers Canal Company v. Frank, 100 N. W. 262, and the testimony of Willis, (Rec. 81, Rec. 62), where he states petitioner is always permitted to divert water in priority order, that the Nebraska Court Decree was to enforce and not destroy priority rights.

### PRAYER

WHEREFORE, petitioner respectfully submits that a writ of certiorari should be granted herein, that by appropriate order of this Court Wyoming water officials should be required to administer the diversion and taking of appropriated water from the natural channel of the North Platte River for beneficial use in strict order of priority, and that no discrimination should be permitted against petitioner because the land irrigated and for which its appropriation was made and adjudicated lies beyond the boundaries of the State of Wyoming.

Respectfully submitted,

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*Attorney for Petitioner.*

# **APPENDIX**

## **Constitutional Provisions and Statutes Involved**

### **A**

#### **CONSTITUTION OF THE UNITED STATES**

##### **Amendments**

###### *Article V.*

"\* \* \* nor shall any person \* \* \* be deprived of \* \* \* property without due process of law."

###### *Article XIV.*

"Section 1. \* \* \* nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### **B**

#### **CONSTITUTION OF WYOMING**

###### *Article I, title, "Declaration of Rights."*

"Section 6. Life, liberty, property. No person shall be deprived of life, liberty or property without due process of law."

"Section 31. Water—Control of. Water being essential to industrial prosperity, of limited amount and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved."

###### *Article VIII, title, "Irrigation and Water Rights."*

"Section 1. Water is state property. The water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."

"Section 2. Board of Control. There shall be constituted a board of control, to be composed of the state engineer

and superintendents of the water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state."

"Section 3. Priority of appropriation. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

"Section 4. Water divisions. The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof."

## C

### Wyoming Revised Statutes, 1931

"Section 122-203. Duties of superintendents. Said division superintendent shall have general control over the water commissioners of the several districts within his division. He shall, under the general supervision of the state engineer, execute the laws relative to the distribution of water in accordance with the rights of priority of appropriation, and perform such other functions as may be assigned to him by the state engineer. It shall be the duty of said division superintendent to regulate and control the storage and use of water under all rights of appropriation which have been adjudicated by the board of control or by the courts, and to regulate and control the storage and use of water under all permits approved by the state engineer, whether the rights acquired thereunder have been adjudicated or not." (L. '90-'91, c. 8, § 14.)

"Section 122-303. Duties of water commissioners. It shall be the duty of the said water commissioner to divide the water of the natural stream or streams of his district among the several ditches and reservoirs taking water therefrom, according to the prior right of each, respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the head gates of ditches, and shall regulate or cause to be regulated the controlling works of reservoirs, in times of scarcity of water, as may be necessary by reason of the priorities of right existing from said streams of his

district. Such water commissioner shall have authority to regulate the distribution of water among the various users under any partnership or incorporated ditch or partnership or incorporated reservoir where rights have been adjudicated in accordance with existing decrees. Whenever, in the pursuance of his duties, the water commissioner regulates a head gate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such head gate or controlling works a written notice, properly dated and signed, setting forth the fact that such head gate or controlling works has been properly regulated and is wholly under his control and such notice shall be a legal notice to all parties interested in the division and distribution of the water to such ditch or reservoir. \* \* \*." (L. '31, c. 109, § 1, amending L. '90-'91, c. 8, § 42.)

"Section 122-304. Control and regulation of water—Oath and bond of water commissioners. Said water commissioner shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partial closing of the head gates as will prevent the waste of water, or its use in excess of the volume to which the appropriator is lawfully entitled. Such water commissioner shall have the authority to require the filling of any reservoir whenever practical and water is available for storage from the stream or streams from which the appropriations for such reservoir are established. \* \* \*." (L. '25, c. 84, § 1, amending C. S. '20, § 923.)

"Section 122-419. Date of priority. The priority of such appropriation shall date from the filing of the application in the engineer's office." (L. '90-'91, c. 8, § 37.)

"Section 89-521. Saving rights of parties not before court. The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in or dismiss the action without prejudice. (R. S. '77, § 2402; R. S. '99, § 3487; C. S. '10, § 4331; C. S. '20, § 5600)."





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FILED

APR 10 1944

CHARLES ELMORE GROPLEY  
CLERK

# The Supreme Court of the United States

OCTOBER 19, 1943, TERM

No. **778**.....

MITCHELL IRRIGATION DISTRICT,

a Corporation,

*Petitioner,*

vs.

JOHN A. WHITING, JR., Water Commissioner, District 14,

Division 1, State of Wyoming,

*Respondent*

## Brief in Opposition to Petition for Writ of Certiorari

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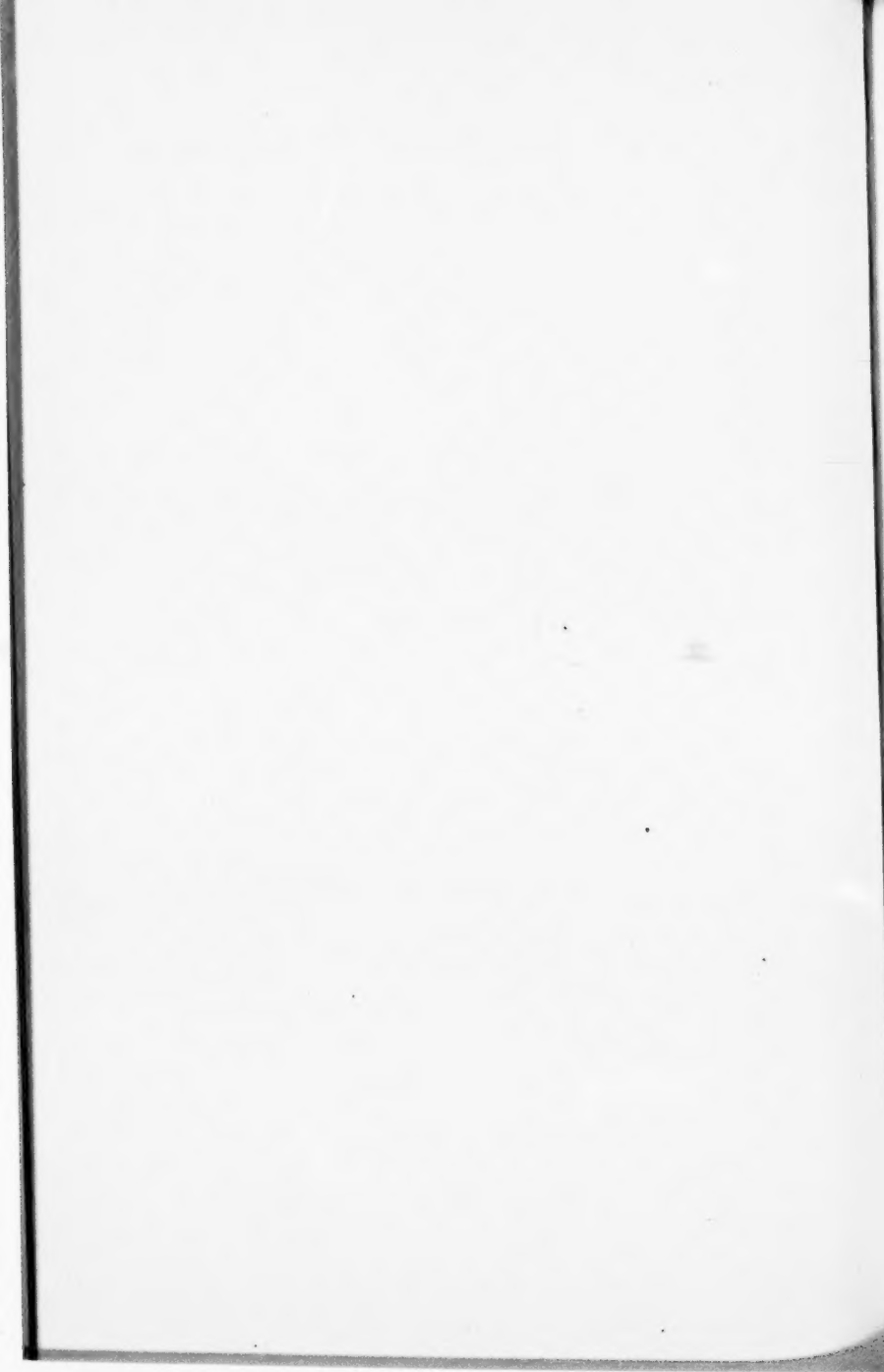
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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### STATEMENT OF CASE

This case arises out of an action which was commenced by the petitioner in the District Court of the First Judicial District of the State of Wyoming, within and for the County of Goshen. The purpose of the action was to secure a mandatory injunction requiring the respondent to administer the use of the water of the North Platte River within his district in a certain manner and to distribute a certain amount of water to the petitioner. The case was tried to Honorable Harry P. Ilsley, District Judge presiding, and resulted in a judgment dismissing the action without prejudice.

At the request of counsel, the trial court made separate conclusions of fact and conclusions of law and filed them in the case. (Transcript of Record, Pages 34-41.)

The eleventh conclusion of law reads as follows:

“That the owners of the Lucerne, The Torrington, the Rock Ranch Enlargement, the Burbank, and the Graten Canal Enlargement in Wyoming, and the Tri State, the Ramshorn, the Minatare, the Winters Creek, the Enter-

prise, the Castle Rock, the Logan and the Belmont Canals, in Nebraska—the same being other users of waters from the North Platte River—are indispensable parties to a determination of the rights of the plaintiff herein, and the rule that a defect of parties is waived by defendant joining issue and going to trial does not apply, as the Court cannot proceed to issue a mandatory injunction without the presence of others who have not been made parties, and, therefore, this action should be dismissed without prejudice.”

Thereupon the Court entered its judgment of April 14,

1942. Omitting the formal parts, the judgment is:

“It Is, Therefore, Considered and Adjudged by the Court that plaintiff take nothing by its petition and that the injunction prayed for in plaintiff’s petition be denied; that this petition be dismissed without prejudice; and that defendant have its costs and expenses herein disbursed and taxed at \$. . . . .”

(Transcript of Record, 42.)

The petitioner appealed the case to the Supreme Court of the State of Wyoming. On April 27, 1943, the Supreme Court of Wyoming announced the decision and sustained the judgment of the trial court. (Transcript of Record 175-195.)

A Petition for rehearing was filed and the Supreme Court of the State of Wyoming denied such petition. (Transcript of Record 197.) The judgment of the Supreme Court affirming the decision of the trial court appears at Page 195 of the Transcript of Record.

For the purposes of our argument, we consider that no further statement of the case is required.

## ARGUMENT

The petitioner made certain allegations in its pleading and certain assignments of error claiming that the action of

the trial court and also of the Supreme Court of the State of Wyoming is in violation of certain provisions of the Constitution of the United States and also in violation of certain provisions of the Constitution of the State of Wyoming.

It will be observed that in deciding the case, the Supreme Court of the State of Wyoming did not discuss any constitutional questions. That court sustained the conclusion of law of the trial court that the case should be dismissed without prejudice because of the absence of necessary parties. (Transcript of Record 190-192.)

This method of disposing of a case where necessary parties are absent is specifically authorized by the statutes of the State of Wyoming. The statute to which we refer is Sec. 89-521, Wyo. Rev. Statutes, 1931. This statute reads:

“The Court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by waiving their rights; but when a determination of the controversy cannot be had without presence of other parties, the Court may order them to be brought in or dismiss the action without prejudice.”

As we have stated, applying this statute, the trial court held that this action should be dismissed without prejudice because of the absence of necessary parties and the Supreme Court of Wyoming sustained this construction and application of the statute. This disposes of the entire case so far as the action originally brought in the District Court of Wyoming is concerned. The discussion of the Supreme Court of other questions which give additional support to the action of the trial court is not material. The case is disposed of by the finding that it must be dismissed without prejudice and the sustaining of that finding and the judgment of the court carrying that finding into effect by the Supreme Court of Wyoming. This renders the consideration of any other questions by this court upon the petition for Writ of Certiorari unnecessary.

IV.

Flourney vs. Wiener, No. 252, decided by this Court Feb. 28, 1944; Chicago Great Western Railway Company vs. Kendall, et al, 266 U. S. 94; 69 L. Ed., 183.

The case having been dismissed without prejudice, the judgment is not final and all questions relative to the merits of the case remain open for further consideration and disposition in future litigation.

Vandalia Railway Company vs. Schnull, 255 U. S. 113; 65 L. Ed. 539; St. Romes vs. Levee Steam Cotton Press, 127 U. S. 614; 32 L. Ed. 289; McGowan vs. Columbia River Packers' Assn., 245 U. S. 352; 62 L. Ed. 342; McLaughlin vs. Swann, 18 How. 217; 15 L. Ed. 357; Baxter vs. Buchholz-Hill Transportation Co., 227 U. S. 637; 57 L. Ed. 681; Abraham vs. Casey, 179 U. S. 210; 45 L. Ed. 156.

Therefore, we submit that the Writ of Certiorari should be denied. The decision that the case should be dismissed for want of necessary parties is a matter for the State Court and the decision that under the statute the case should be dismissed without prejudice is also a matter for the State Court. The decision and action of the State Court upon these two points dispose of the case and render it entirely unnecessary to consider any constitutional or other federal question.

Respectfully submitted,

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